LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 3 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~867~~ 70-26

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,
Appellant,

v.

JOHNNY C. WILSON, *Appellee.*

On Appeal from the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE APPELLANT

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

FRANKLIN PIERCE
Attorney

P. O. Address:

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5

ARGUMENT

I. A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH — 6

II. A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH

Page

OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION ____ 14

CONCLUSION ____ 24

PROOF OF SERVICE ____ 25

APPENDIX:

Docket entries (5th Cir. App. 6-8) ____ 1, 2

Petition for a Writ of Habeas Corpus, paragraphs 5 and 6(a). (Record 2-3 as reproduced 5th Cir. App. 8-9) ____ 3

Order of the District Court dated March 4, 1969, and entered March 5, 1969. (Record 236-327, as reproduced 5th Cir. App. 10-11) ____ 4

Order of the District Court dated July 7, 1969, and entered July 8, 1969. (Record 364-372, as reproduced 5th Cir. App. 14-22) ____ 6

Opinion of the Court of Appeals. (Record 390) ____ 14

The Judgment of the Court of Appeals. (Record 391) ____ 20

TABLE OF AUTHORITIES

Cases Cited:

Baggett v. Bullitt, 377 U.S. 360 (1964) ____ 7, 17

Behling v. State, 110 Ga. 754, 755 (1900) ____ 18

TABLE OF AUTHORITIES—continued

Page

Bond v. Floyd, 385 U.S. 116 (1966) 9

Brandenburg v. Ohio, 395 U.S. 444 (1969) 7, 10, 11, 13, 22

Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) 12

Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) 16, 17, 23

Cohen v. California, ___ U.S. ___ (1971) 7, 9, 11, 14, 22, 23

Cox v. Louisiana, 379 U.S. 559 (1965) 9

Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278 (1961) 17

Dillard v. State, 41 Ga. 278, 281, 282 (1871) 18, 19, 20

Elmore v. State, 15 Ga. App. 461 (1914) 10, 19, 20

Feiner v. New York, 340 U.S. 315 (1951) 11

Fish v. State, 124 Ga. 416 (1905) 18

Fuller v. State, 72 Ga. 213 (1883) 18

Gregory v. Chicago, 394 U.S. 111, 125 (1969) 21, 22

Hardin v. State, 114 Ga. 58 (1901) 18

Jackson v. State, 14 Ga. App. 19 (1913) 19, 20

Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) 7

TABLE OF AUTHORITIES—continued

Page

Landry v. Dailey, 280 F.Supp. 939, 951 (E.D. Ill. 1968), *appeal dismissed Landry v. Boyle*, 393 U.S. 220 (1968) 15, 16

Mills v. Alabama, 384 U.S. 214 (1966) 9

People v. Sinclair, 149 N.Y, Supp. 54 (Gen. Sess. 1914) 18

Peters v. State, 51 So. 952, 953 (Ala. 1910) 18

Roth v. United States, 354 U.S. 476, 483-84, 491 (1957) 9, 16, 17

State v. Pope, 96 A. 313, 314 (Conn. 1916) 18

Stevenson v. State, 90 Ga. 456, 458 (1892) 17

Terminello v. Chicago, 337 U.S. 1 (1949) 11

Times Film Corp. v. Chicago, 365 U.S. 43 (1961) 9

United States v. Harriss, 340 U.S. 612, 617 (1953) 16

United States v. Robel, 389 U.S. 258 (1967) 7

United States v. Strong, 263 F. 789, 796 (W.D. Wash.) 17

Wood v. Georgia, 370 U.S. 375 (1962) 9

U. S. CODE

28 U.S.C. § 1254 2

28 U.S.C. § 2241 2

TABLE OF AUTHORITIES—continued

Page

GEORGIA CODE

Ga. Code § 26-1409 (1933) 3

Ga. Code § 26-6303 (1933) 3

Miscellaneous:

Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand.L.Rev. 531, 539-43 (1950) 16

Ohio Rev. Code § 2923.13 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 867

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,

Appellant,

v.

JOHNNY C. WILSON, *Appellee.*

On Appeal from the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 431 F.2d 855. It is reproduced in the Appendix at pp. 14-19.

The opinion of the United States District Court for the Northern District of Georgia is reported at 303 F.Supp. 952. It is reproduced in the Appendix at pp. 6-12.

JURISDICTION

This suit was originally commenced in the United States District Court by a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241 et seq., seeking to set aside the appellee's State-court conviction. (Appendix 3). The appellant relied upon a State statute in support of his contention that the restraint imposed by him on the appellee's liberty was not in violation of the Constitution, treaties or laws of the United States. The District Court entered an order on July 8, 1969 in favor of the appellee and based entirely upon the District Court's determination that the State statute upon which the appellant relied was invalid and repugnant to the Constitution. (App. 6-13). The decision of the District Court was appealed to the United States Court of Appeals for the Fifth Circuit, which on August 19, 1970, entered a judgment affirming the judgment of the District Court. (App. 14-20). A notice of appeal to this Court was filed in the Court of Appeals September 3, 1970, and probable jurisdiction was noted on June 21, 1971. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

STATUTES INVOLVED

Section 26-6303 of the Code of Georgia (1933) provided as of the dates involved in this case:

> *"26-6303.* (387 P. C.) *Using abusive or obscene language.* — Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence, or by telephone to, of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character, shall be guilty of a misdemeanor. (Acts 1865-6, p. 233; 1872, p. 9; 1875, p. 25; 1890-1, p. 83; 1919, p. 103, 1963, pp. 455, 456.)"

Section 26-1409 of the Code of Georgia (1933) provided as of the dates involved in this case:

> *"26-1409.* (103 P. C.) *Opprobrious words as defense; question for jury.* — On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury. (Cobb, 841.)"

STATEMENT

On February 2, 1967, the appellee, Johnny C. Wilson, was convicted of the unprovoked use to another, in

the other's presence, of opprobrious words or abusive language tending to cause a breach of the peace. Ga. Code § 26-6303 (1933), Ga. Code Ann. § 26-6303 (1953 Rev.). Wilson's application for federal habeas-corpus relief, after reciting the details of his conviction, set out among other things, the following claim for relief:

> "5. Ga. Code Ann. § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprize persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. . . .
>
> "6. Ga. Code Ann. § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:
>
> > (a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words 'opprobrious words or abusive language,' thereby leaving the determination of petitioner's guilt to the discretion of the jury without adequate safeguards of petitioner's due process right of notice or first amendment right of freedom of speech." (App. 3).

The District Court construed the attack upon Ga. Code Ann. § 26-6303 a private, unofficial, copyrighted publication, as an attack upon the constitutionality of Ga. Code § 26-6303 (1933), and limited the scope of its inquiry to the facial constitutionality of this statute.

(App. 6). By order dated July 7 or 8, 1969, and entered July 8, 1969, the District Court declared the criminal statute in question to be unconstitutionally vague and overly broad. (App. 6-20).

A notice of appeal to the United States Court of Appeals was filed in the District Court on July 11, 1969, and a protective notice of appeal to this Court was filed in the District Court on July 17, 1969. This latter appeal was dismissed for want of jurisdiction on December 8, 1969. By judgment dated and entered August 19, 1970, the Court of Appeals affirmed the judgment of the District Court declaring the criminal statute in question to be unconstitutionally vague and overly broad. (App. 14-20).

SUMMARY OF ARGUMENT

A State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace does not intrench upon or restrict speech protected by the first amendment. The protection of the first amendment extends to the exchange of ideas; "fighting words" are not within the parameters of its protection. The States have a valid interest in proscribing the use of personally abusive epithets which, when addressed to an ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. The statute under attack does nothing more than carry into effect this valid concern and power.

The elements of the statute under attack are adequately defined. As defined, the statute provides fair notice to persons of ordinary intelligence of the conduct

thereby forbidden, and establishes for the criminal courts adequate and proper standards for adjudication of charges thereunder laid. A consideration of the cases construing the elements of the offense makes it clear that the opprobrious words and abusive language which are thereby prohibited are those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment. The statute under attack simply states in statutory language what this Court has previously denominated "fighting words."

ARGUMENT

I

A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

The appellee, Wilson, in his application chose to launch an attack upon the constitutionality of a state statute based on alleged vagueness *and* overbreadth. While recognizing that this is now a commonly accepted mode for mounting constitutional offensives, the appellant submits that the concept of overbreadth is more properly addressed to the first-amendment protections while the concept of vagueness is a due-process consideration. Practice does not make perfect, and constitutional concepts would seem to be entitled to the integrity of

their individual identities. This is especially true when the concepts are separately written upon the body of the Constitution by distinct amendments entered at different times. Absent such a separation, sound analytical application of constitutional principles and concepts is ofttimes impossible. Unfortunately, the opinion adopted by the court below made no attempt to distinguish between the two concepts. Consequently, the matter of the alleged vagueness of the statute will necessarily have to be treated together with the alleged first-amendment deficiency. At the same time, the appellant requests the Court to consider the fact that two separate, important principles are involved.

It is recognized that some statutes, notably those directed toward the control of political activity and advocacy, have been found to be unconstitutional where they have attempted to proscribe and make punishable the exchange of ideas and the advocacy without overt act of unlawful conduct. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). These statutes, and the cases involving them, have been uniformly concerned with conduct which is political and which is embraced within the first amendment. Other decisions have dealt with situations where statutes have proscribed conduct broadly, so as to sweep within the coverage of the statutory proscriptions conduct within the protection of the first amendment. *Cohen v. California*, ____ U.S. ____ (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Unfortunately, some of these decisions are accom-

panied by opinions couched in the language of due process and touching upon the void-for-vagueness doctrine; however, it is submitted that the thread of constitutional infirmity which links these decisions, and others of similar import, is the fact that the statutes involved attempted to over-regulate protected first-amendment conduct. The question of overbreadth is truly a first-amendment question—one which can only be resolved by ascertaining the limitations of the proscription on conduct which the statute under attack sets forth and comparing this ascertained proscription with the protected areas of expression.

Ga. Code § 26-6303 (1933), the statute here under attack, does not infringe upon or restrict protected speech; that portion herein involved is a simple criminal prohibition directly related to that body of the law which defines and punishes the offense of assault and battery. Ga. Code § 26-1409 (1933), Ga. Code Ann. § 26-1409 (1953 Rev.). The obvious design of the statutory scheme is to avoid personal violence and not to regulate public speech.

A fair reading of the statute under attack indicates that it prohibits nothing more than the use of opprobrious and abusive words under circumstances which tend to cause shootings, stabbings, fisticuffs, and common affrays. It prohibits persons from engaging in conduct which constitutes a justification for a simple assault and battery. As such, it is not a political statute. Its provisions are not so broad as to prohibit or infringe upon even the most flaming political argument or debate, the object of which is to quicken the sense of the hearer and to move him to engage in a protracted expression of his own political philosophy.

The first amendment was not intended, and is not applied, to protect all speech, i.e., all verbal exercises. *Cohen v. California, supra* at p. 4. Freedom of speech is not an absolute right. *Cox v. Louisiana,* 379 U.S. 559 (1965). In declaring that obscenity is not protected by the first amendment, this Court held that:

> "The unconditional phrasing of the first amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 483-84 (1957).

Even the *Roth* dissenters expressed the thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.* at 514. Cf. *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961).

This Court has proclaimed on numerous occasions that the constitutional guarantee of freedom of speech is concerned with the exchange of political and social ideas, and the Court has expressly held that "the central commitment of the first amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide open.' " *Bond v. Floyd,* 385 U.S. 116 (1966). See also *Wood v. Georgia,* 370 U.S. 375 (1962). In fact, there appears to be universal agreement that a major, if not the major, purpose of the first amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214 (1966).

At this point, it seems proper to stop and examine again the Georgia statute under attack and to note, by a process of exclusion, what it does not purport to make

punishable. It does not seek to punish the advocacy of an idea. *Brandenburg v. Ohio, supra.* The statute as drafted leaves one free to use abusive and opprobrious language to advocate the violent overthrow of our system of government, if that be the person's desire. It does not apply to abusive or opprobrious language utilized in the mere abstract teaching of the moral propriety or necessity for a resort to force and violence to effect political and/or social changes. Cf. *Elmore v. State,* 15 Ga. App. 461 (1904). It does not attempt to affect the mass dissemination of ideas by media or printed matter.

A person is free, if that be his desire, to use opprobrious and abusive language in describing another person not in the presence of the person so described. The speaker may even use opprobrious and abusive language to or about another person in his presence provided, of course, that the use of the language under the circumstances does not tend to a breach of the peace. As viewed, the statute is not designed to regulate social or political commentary and activity.

The first amendment protects the freedom of assembly; however, it does not protect assemblage which is incidental to, and a part of, a punishable conspiracy. In the present case, we are concerned with a statute which on its face does not attempt to regulate advocacy, instigation or incitation. Rather it deals solely with face-to-face provocation. The appellant submits that the first amendment's protection of free speech was never intended to clothe a person in immunity who by use of words to and in the face of another person intentionally provokes that other person to acts of violence *against*

the speaker. Cf. *Cohen v. California, supra* at p. 6; *Feiner v. New York*, 340 U.S. 315 (1951); *Terminello v. Chicago*, 337 U.S. 1 (1949). Such an extension of the first amendment would not be in line with ordered concepts of civilized democracy; rather, it would necessarily tend toward a disorderly, bawdy and violent social structure.

The States have a legitimate interest in prohibiting the use of abusive and opprobrious words which tend to provoke violent, immediate, physical affrays. The common need of all citizens, including those who desire to engage in peaceful expressions of their political views, to live in a society in which free and robust debate is a meaningful concept is a compelling reason for the States to restrict the use of abrasive language which tends to provoke others to the commission of immediate, physical violence. Stirring the listener to action by a heated debate, a coolly logical speech, or even a wildly emotional harangue is an acceptable practice and a constitutionally protected right. But, deliberate provocation of killing or violence—acts to which the Georgia statute is addressed—has not enjoyed historical acceptance in this country. Even debate or speech-making, designed to move the listener to constructive, albeit loud, political action cannot survive in a community which is impotent to prevent a man from deliberately triggering physical outbursts.

An examination of the Supreme Court's opinion in *Brandenburg v. Ohio, supra,* will furnish a very adequate vehicle for illustrating the operation of the statute under attack. In footnote 1 of the Court's per curiam opinion there were set forth various phrases derogatory of negroes and Jews. According to the opinion, these

phrases were clearly understandable from the sound track of a sound motion-picture film taken at a Ku Klux Klan rally in Ohio. This film had been introduced into evidence against the defendants who had staged the rally in a prosecution under the Ohio Criminal Syndicalism statute, Ohio Rev. Code ¶ 2923.13. By derivation, it is not difficult to imagine and picture the situation were any one of these phrases to be used in a direct face-to-face confrontation with an ordinary member of the class thereby degraded. Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

The situation is not one then of mere advocacy of an idea nor the communication of thoughts. In such a circumstance the words, many of which are obviously opprobrious, and the language, much of which is clearly abusive, constitute a provocation to physical conflict. Under the laws of Georgia, as previously pointed out, they could well be found to constitute a justification for an assault by the demeaned person upon the speaker. The State of Georgia submits that the first amendment was never intended and has never been applied to negative the police power of the States to make punishable such deliberate provocations. There is simply nothing in any majority opinion of the Supreme Court in the area of first-amendment rights which indicates that the States are helpless and powerless to proscribe what in effect amounts to a verbal assault.

The shaking of a fist by a speaker in the advocacy of an idea may under certain constructions of the first amendment be protected, symbolic free speech, but none of these theories would go so far as to say that the belligerent shaking of the fist under the nose of another

person is not conduct which the States may punish. Yet, it is but a small step from the decision of the court below to a decision striking down simple assault statutes on the ground that they contravene the first amendment.

Additional support for the statute's constitutional validity can be found in the continuing vitality of the clear-and-present-danger limitation on first-amendment freedoms. *Brandenburg v. Ohio, supra.* It is possible that this limitation has by virtue of a footnote in the *Brandenburg* majority opinion been relabeled the "tendency to produce forcible action" limitation. *Brandenburg v. Ohio, supra* at 447, n. 2. In either case, the Georgia statute is within the limitation.

It is to be noted that the statute under attack does not proscribe the use of language tending to a breach of the peace; rather, it proscribes the use of such language *to and of another person and in his presence* tending to a breach of the peace. We only need to reimagine the illustrations conveyed by the *Brandenburg* decision to realize the extreme importance of this difference in testing the statute under the first amendment. Certainly, it cannot be said that the Georgia statute does anything more than proscribe language fully and completely related to its tendency to produce forcible action. Again, it is impossible to construe the Georgia statute as being applicable to the mere advocacy of an idea.

For these reasons, and in light of the foregoing discussion, the State of Georgia submits that its statute which the court below declared unconstitutional does not by its language breach protected first-amendment liberties. Provoking a fight, whether it be by "getting in the first lick" or by using abrasive language is criminal

conduct. Criminal conduct per se does not enjoy first amendment protection.

The State of Georgia submits that provoking a fight is a common crime and that such provocations are not shrouded under the mantel of the first amendment. Provoking a blow with the fist or the retort of a pistol has never been, and should not now be, equated with provoking those mental processes which lead to a useful social and political change. The appellant submits that a careful reading of Ga. Code § 26-6303 reveals that the statute does not infringe upon constitutionally protected speech. It is simply a ban upon the use of personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Cohen v. California, supra* at pp. 5-6.

II

A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION.

While the constitutional cornerstones of alleged vagueness and overbreadth have been placed in close juxtaposition, the concepts represented by the two words are not necessarily allied, for a statute could employ words of precise and definite meaning to intrude upon an area substantively protected by the Constitution. On the other hand, a statute could employ vague and imprecise words raising procedural due-process questions, and still not be overly broad because of its lack of infringement upon a substantive constitutional provision.

A differentiation between the concepts of vagueness and overbreadth should be drawn in this case for two principal reasons. Firstly, the Georgia statute is neither vague nor overly broad. Secondly, the two concepts are not mutually inclusive, and the doctrines represented should not be mingled and allowed a degree of interplay which would permit each of the diverse concepts to come in aid of the other.

Implicit in the appellee's claim of vagueness is the contention that he, as an individual of at least ordinary intelligence, cannot understand the statute, for "the concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Landry v. Dailey*, 280 F.Supp. 938, 951 (E.D. Ill. 1968), appeal dismissed *Landry v. Boyle*, 393 U.S. 220 (1968).

The overbreadth claim necessarily rests upon a contention that the statute infringes upon a substantive right specifically guaranteed by the Constitution. In drawing the distinctions between the legal concepts of vagueness and overbreadth, the three-judge court in *Landry, supra*, pointed out that "the concept of overbreadth . . . rests

on principles of substantive due process which forbid the prohibition of certain individual freedoms." *Landry v. Dailey, supra* at 951. Having previously shown that the statute is not overly broad so as to prohibit substantively protected first-amendment exercises, the appellant now turns to the due-process claims, including the appellee's first-amendment "vagueness" claims.

The Georgia statute is plain on its face. As such, the statute does not really require judicial construction, as its meaning is clear without interpretation. In examining a statute, a court should accord it a normal and ordinary construction as indicated by the words employed by the legislative draftsmen. The standard to be used is whether the statute gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 340 U.S. 612, 617 (1953). The words employed in a statute generally have the meaning ordinarily ascribed them by "men of common intelligence." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942). For an additional detailed discussion of this general area, see Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand.L.Rev. 531, 539-43 (1950).

In disposing of the alleged due process deficiencies in the statutes involved in the now famous *Roth* and *Alberts* obscenity cases, this Court held that

> "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices. . . .*'" *Roth v.*

United States, 354 U.S. 476, 491 (1957). (Emphasis added.)

Just as the citizens of the United States were held to recognize the conduct forbidden by the obscenity statutes involved in the *Roth* and *Alberts* cases, men of common understanding know, without being told by the General Assembly of Georgia, that the expression of some thoughts under particular circumstances is highly likely to produce a black eye or a broken nose. This obvious truth has received judicial recognition and application. *Chaplinsky v. New Hampshire, supra* at 573. The Georgia statute does not forbid "conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt, supra.* See also *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961).

The appellant submits that the statute more than adequately meets due-process requirements and that it is not overly broad. While this may be discerned from a reading of the statute, it is unnecessary to indulge in speculation concerning its application, as numerous cases have reached the appellate courts of Georgia requiring the application of Ga. Code § 26-6303. The standard, prevailing rule of statutory construction was early applied to the language of this section. *Stevenson v. State*, 90 Ga. 456, 458 (1892). Consequently, the phrase "opprobrious words or abusive language" is to be taken in the ordinary sense conveyed by the words.

In determining the ordinary sense of words, reference to a standard, accepted dictionary has been judicially approved. *United States v. Strong*, 263 F. 789, 796

(W.D. Wash.). Thus, "abusive" is synonymous with coarse, insulting words. Webster defines "abusive" as "given to or tending to abuse". "Abuse" is by Webster defined as "vituperative words; coarse, insulting speech; abusive language; virulent condemnation; reviling." The same authoritative source defines "opprobrious" as being expressive of opprobrium (reproach, disgrace, contempt, infamy, reprobation), as attaching disgrace, as being reproachful and/or scurrilous. Opprobrious language is disgraceful, abusive, insulting, offensive, scurrilous, gross and vulgar. Thus, opprobrious has been judicially defined as meaning reproachful, scurrilous, infamous. *Behling v. State*, 110 Ga. 754, 755 (1900); *Dillard v. State*, 41 Ga. 278, 281, 282 (1871). The term "abusive and opprobrious language" contemplates words conveying contempt and insult. *Behling v. State, supra.* Similar definitive concepts have been applied in other states. See *Peters v. State*, 51 So. 952, 953 (Ala. 1910); *State v. Pope*, 96 A. 313, 314 (Conn. 1916); *People v. Sinclair*, 149 N.Y.Supp. 54 (Gen. Sess. 1914).

It is important to note that the Georgia statute under attack does not prohibit the use of abusive language and opprobrious words. Considerably more is required in order for conduct to become punishable under the statute. "Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation." *Fuller v. State*, 72 Ga. 213 (1883), approved *Hardin v. State*, 114 Ga. 58 (1901). See also *Fish v. State*, 124 Ga. 416 (1905).

> "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or idea the words are intended to convey. There is not a single word in the language, how-

ever coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. Words get their point and meaning almost entirely from the time, place, circumstances and intent with which they are used, and it seems to us a very unfair interpretation of this clause of the Code to say, that it is directed simply against the use of certain words which are by common consent banished from decent society. If there are any such words in our language they are very few, and as we have said, they are only obscene and vulgar accordingly as they convey obscene and vulgar ideas.

"This statute does not stand upon the footing of statutes against public indecency. Its object is not to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and *forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another.*" *Dillard v. State, supra* at 281. (Emphasis added.)

In every prosecution involving the statute under attack, a mixed question of fact and law is whether the alleged words were likely to cause a breach of the peace. *Jackson v. State,* 14 Ga. 19 (1913). Further, the statutory language relating to the tendency to breach of peace has been adequately construed by the Georgia courts so as to define the situations within which the use of abusive and opprobrious language, as commonly understood, is prohibited. *Elmore v. State,* 15 Ga. App. 461 (1914); *Jackson v. State, supra.*

"Though the words failed to bring about a breach

> of the peace, the offense is complete if this would nevertheless be the ordinary and natural tendency. The words of the statute, 'tending to cause a breach of the peace,' are words of description indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace. . . ." *Elmore v. State, supra* at 461-2.

Thus, this portion of the statute has been judicially construed as "likely to cause a breach of peace," or, in other words, language "which would naturally tend to cause a breach of the peace under ordinary circumstances." *Elmore v. State, supra; Jackson v. State, supra.* The *Elmore* decision makes it abundantly clear that the terminology breach of peace is judicially considered to be a resentment by physical assault and battery. *Elmore v. State, supra* at 462-3. Hence legislative intention is to provide the affronted person "some other remedy than that which nature dictates, to-wit, club law." *Dillard v. State, supra* at 280.

The thrust of these decisions illustrates the fact that, as construed by the Georgia courts, the statute in question is not applied to regulate speech. It is not a statute enforcing any concept within the general view of public morals. Instead, it falls within the area of those statutes designed to further the State's domestic peacekeeping function. Under the statute as construed, a person is free to utilize abusive language and opprobrious words so long as he does not utilize those words in a contextual situation where, under ordinary circum-

stances, the natural effect of the language would be to cause a breach of the peace. Just as one is not free to cry "fire" falsely in a crowded theater, one is not free, however naturally coarse, abusive and opprobrious he might be, to use abusive language and opprobrious words to and of another, and in the other's presence, in a situation where, under normal and natural circumstances, a breach of the peace is thereby likely to be caused.

The appellant submits that the interpretations placed upon the statute by Georgia appellate courts adequately demonstrate the narrow range within which the statute operates. It is well to emphasize that as construed no less than four distinct elements must be present in order to sustain a conviction under the section in question. Firstly, there must be abusive language or opprobrious words, as the same is commonly understood. Secondly, these words or this language must be used to or of another person. Thirdly, the remarks must be made in the immediate, direct presence of the person either to whom it is addressed or of whom it has reference. Fourthly, the entire situation in which the words are spoken must, under normal circumstances, color the conduct of speaking so as to make this conduct likely to cause a breach of the peace. Taken together these four elements outline a proscription of provocative, assaultive conduct which it is clearly within the police power of the States to prohibit.

The latest decisions of this Court continue to reaffirm the proposition that first-amendment rights are related to political activities and not to mere criminal conduct. "Speech and press are, of course, to be free, so that *public matters can be discussed* with impunity." *Gregory v.*

Chicago, 394 U.S. 111, 125 (1969), separate opinion. The Court recognizes that men's homes can be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago, supra* at 125 (Black and Douglas, JJ., concurring). If the minds of men may be protected from the communication of "fears of the unknown", the appellant submits that there can be no question that overt and assertive offers of violence (constituting known fears) may be prohibited.

In dealing with Ohio's criminal syndicalism statute, this Court noted that the statute failed to distinguish between mere teaching of violence and "preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio, supra* at 448. In striking down the statute, the Court said that there was no narrowing State construction of the definition of the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 447. The *Brandenburg* Court said, in effect, that a statute may not forbid mere advocacy. That proposition is unquestioned. The Court did not leave the matter there. It said, at least inferentially, that a statute prohibiting speech which incites "to imminent lawless action" is permissible. The Georgia statute prohibits abusive and opprobrious speech "tending to cause a breach of the peace". There is neither logical nor legal difference between the concepts represented by the words "tending to cause a breach of the peace" and "incitement to imminent lawless action".

In *Cohen v. California, supra* at pp. 5-6, this Court reaffirmed its traditional view that the States are free

to proscribe without a demonstration of additional justifying circumstances the use of "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. The "fighting words" terminology of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), was again noted. The fact that the California statute reached beyond instances of personally provocative words or phrases "directed to the person of the hearer" was meaningfully noted. *Cohen v. California, supra* at p. 6.

Had the State of Georgia chosen to define the proscribed conduct as "fighting words", the contention undoubtedly would be advanced that this definition was inadequate to succinctly describe and functionally narrow the elements of the offense. It is submitted that what the General Assembly has done in the statute under attack is to define with greater particularity those words and coupled circumstances which this Court on several occasions has characterized as "fighting word". The language of this workman-like codification reaches no further than those situations discussed by this Court in *Chaplinsky v. New Hampshire, supra* and simply and adequately prohibits what the speaker should recognize as a deliberate provocation to violent resentment. It is a simple criminal statute which, while it deals with verbal conduct, has no other reasonable nexis with the first amendment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

FRANKLIN PIERCE
Attorney

PROOF OF SERVICE

I, Dorothy T. Beasley, one of the attorneys for the Respondent-Appellant, the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of ....., 1971, I served copies of the foregoing Brief for the Appellant on the several parties thereto, as follows:

On Johnny C. Wilson, the Petitioner-Appellee, by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid, to his attorneys of record, as follows:

Mr. Howard Moore, Jr., and Mr. Peter Rindskopf, Moore, Alexander & Rindskopf, Suite 1154, Citizens Trust Company Bank Building, 75 Piedmont Avenue, N.E., Atlanta, Georgia 30303.

/s/ DOROTHY T. BEASLEY

DOROTHY T. BEASLEY

P. O. Address:

132 Judicial Bldg.
40 Capitol Square
Atlanta, Ga. 30334